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In the Supreme Court of the United States

OCTOBER TERM 1992

B. C., JR.
Petitioner

v.

STATE OF LOUISIANA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state that accepts funds under the Individuals With Disabilities Education Act ("IDEA") may implement a statutory scheme that allows a juvenile court, in a Child in Need of Supervision proceeding, to abrogate an emotionally disturbed child's right under IDEA to receive a free appropriate public education, by unilaterally dictating, as a condition of probation, that the child's educational placement be restricted to homebound instruction for the next four years.

LIST OF PARTIES

Petitioner is B. C., Jr., a minor child, who was the defendant in the juvenile court proceedings at issue herein and the appellant in the Louisiana Court of Appeal for the Third Circuit. Respondent is the State of Louisiana, through Edward Tarpley, Jr., the District Attorney for the Parish of Grant, Louisiana and Richard Ieyoub, the Attorney General for the State of Louisiana.

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PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner B.C., Jr.[1] a student with disabilities as defined by federal law, requests that a writ of certiorari issue to review the judgment and opinion of the Louisiana Court of Appeal, Third Circuit, entered on December 9, 1992, which upheld the authority of the Juvenile Court for the Parish of Grant to severely restrict

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[1] To maintain confidentiality, petitioner is referred to herein by his initials, as was done in the state court public documents.

the education of Petitioner, and thereby effectively abrogate his rights under the Individuals with Disabilities Education Act.

OPINIONS BELOW

The opinion of the Louisiana Court of Appeal for the Third Circuit, reprinted in the Appendix beginning at page A-1, is officially reported at 610 So. 2d 204 (La.App. 3rd Cir. 1992). The judgments of the Juvenile Court for the Parish of Grant, Lousiana, reprinted in the Appendix beginning at pages A-18 and A-21, are unreported.

STATEMENT OF JURISDICTION

1. The Judgment of the Louisiana Court of Appeal for the Third Circuit was rendered on December 9, 1992. Petitioner's application to the Louisiana Supreme Court for writs of certiorari and review of the Court of Appeal decision was

filed on January 6, 1993 and was denied on February 19, 1993. (Appendix, page A-22).A motion for reconsideration of a denial of writs is not permitted. Supreme Court of Louisiana Rule IX, Section 6. Appendix, page A-23. Therefore, the decision of the Court of Appeal is final. This petition for writ of certiorari is being filed within ninety days of that final judgment.

2. The federal questions were raised in the proceedings below as indicated at pages 8-10, 13-14 *infra*.

3. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1257 (a).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Individuals with Disabilities Education Act, (IDEA): 20 U.S.C. §1400; §1401 (a)(1),(6),(7),(16),(18),and (20); §1412;

and §1415; and its implementing regulations, 20 CFR Part 300: § 300.7 (a)(1),(b)(9); §300.305, §300.343, §300.344, §300,533, §300.551, and §300.552, are set forth in the Appendix beginning at pages A-24 and A-52, respectively. Pertinent Louisiana special education regulations, Bulletins 1706, § 449 and Bulletin 1508,page 41 "Behavior Disorder", are set forth in the Appendix beginning at pages A-62.and A-65, respectively.

STATEMENT OF THE CASE

B.C., Jr., a student, now fourteen years old, enrolled in Grant Parish public schools, has been classifed since 1986 as having the disablity of behavior disorder[2] and has received special

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[2] Louisiana's Bulletin 1508 definition of behavior disorder, which is comparable to the IDEA definition of "seriously emotionally disturbed", 34 C.F.R.§300.7(b)(9), is included in the Appendix beginning at page A-65.

education services to address this disability.

According to his educational multi-disciplinary evaluation, B.C.'s disability causes him to exhibit behaviors such as verbal abusiveness towards teachers and other adults, physical aggression toward classmates, defiance toward adult authority figures, and a tendency to deny the blame for his wrongdoing. B.C. has also been diagnosed as having an oppositional defiant disorder and conduct disorder, as well as a mild, chronic depression , related to his inability to resolve his grieving over the death of his father.

Until September of 1991, B.C. received special education services to address his behavior disorder as part of a full day program in a regular junior high school environment. Despite his

disabilities, B.C. was performing well academically and making progress toward his high school diploma under this program.

In September, 1991, when he was twelve years old, B.C., who is black, was suspended from school for pushing a white female student. On September 18, 1991, after a complaint was lodged by the girl's father, a petition was filed by the District Attorney in the Grant Parish Juvenile Court asking that B.C. be declared a "Child In Need of Supervision" (CINS) under the Louisiana Children's Code[3] because of this and other incidents involving B.C.'s behavior at school. At an October 2, 1991 adjudication hearing,

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[3] Defined, in relevant part, as a child who "is habitually truant from school or willfully violates the rules of the school". La.Children's Code Art. 791.1(1) (eff. Jan 1, 1992); formerly La.Code of Juvenile Pro. Art.13. Note: Effective July 1, 1993, there will be more CINS proceedings in Louisiana juvenile courts, but rather "Families in Need of Services" proceedings. La.Children's Code Art. 791.

B.C. pled guilty to being a CINS and the Juvenile Court ordered that homebound instruction be provided to him by "the appropriate educational authority." Appendix at page A-21. Homebound instruction refers to the provision of educational services, for a few hours a week, at a student's home. Louisiana's special education regulations permit the provision of homebound instruction in only a very few, very specific circumstances.[4] , none of which apply to B.C.

On October 11, 1991, the Grant Parish special education department held an Individualized Education Program (IEP) meeting to discuss B.C.'s educational program, as is required by state and federal law whenever a special education student is disciplined. At that meeting,

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[4] Bulletin 1706,§ 449. Appendix pages A-62 - 65.

the committee determined that the behavior for which B.C. was punished (the pushing of the female student) was related to his disability. It further determined that B.C. could return to school, with the school system providing him with an aide who would provide one-on-one supervision to assist him in controlling his aggressiveness and to provide immediate controls over any inappropriate behavior. A similar plan had proven successful in enabling B.C.to complete the 1990-91 school year with passing grades. However, according to the testimony of the Special Education Supervisor, the IEP has never been implemented due to the Juvenile Court order of homebound instruction.

On October 22, 1991, Petitioner's counsel filed a motion to revoke the order of homebound placement, alleging

that the Juvenile Court lacked jurisdiction over the educational placement of the child because of his rights under the IDEA, or, in the alternative, that the Juvenile Court should defer to the opinion of education professionals. Appendix, pages A-67 - A-72. At a hearing on November 14, 1991, Ms. Ollie Goudeau, the Supervisor of Special Education for Grant Parish, testified regarding special education law and procedures, and the professional conclusions of the IEP committee.

Counsel for both sides subsequently submitted memoranda on the issues presented, including the federal question of the effect of the IDEA on orders of a Juvenile Court. Petitioner's counsel also submitted, as additional evidence, the child's most recent multi-disciplinary evaluation, along with a

motion seeking a ruling on the federal issue of the Juvenile Court's authority to make educational decisions abrogating the Petitioner's IDEA rights. Appendix, pages A-73 - A-77.

The record before the Juvenile Court contained the invesigating police detective's notes, statements, and reports compiled when the original complaints against B.C. were being investigated, which were included in the record at the time the child pled guilty. Also included were the pre-dispositional report, including an evaluation by psychologist Ronald S. Pryer, Ph.D.; the testimony of the parish Supervisor of Special Education; the IEP developed and agreed to by the child, his parent, the special education supervisor, and the teacher and principal who had provided statements to the investigator; and a

twenty-three page multi-disciplinary special education re-evaluation of the child prepared by two social workers, an assessment teacher, two psychiatrists, and a psychologist.

In the child's re-evaluation this multi-disciplinary team of qualified persons, who had conducted a thorough review of the child's special education needs, concluded that he should be served in a highly structured class at school. Dr. Ware, a consultative psychiatrist, specifically recommended that the child be seen by a male counselor, preferably in the school setting. He recommended that he be allowed to re-enter school as soon as possible on a trial basis, and further stated that the child would benefit from returning to school with an opportunity to play basketball and be

under the tutorship of the basketball coach.

In the psychological evaluation attached to the pre-dispositional report furnished to the court in October, 1992, it was recommended that the child continue in counseling and be considered for possible medication if he is to remain in the public school system, but there was no recommendation that he not do so.

Despite this clear evidence of the educational and psychological needs of this disabled child, and the recommendations of knowledgeable persons based on evaluation data, the probation officer recommended continued homebound services. However, he gave no reasons and provided no evidence in support of this recommendation.

At a June 3, 1992 hearing, the Juvenile Court indicated it did not wish to hear further evidence, then consulted with the probation officer and rendered a judgment of disposition which included, as a special condition of probation, "continued home bound instructions as provided by the Grant Parish Board of Education." Probation is to continue until October 20, 1995, B.C.'s eighteenth birthday. Appendix, pages A-18 - A-20. No written or oral reasons for judgment were given.

Petitioner timely appealed this judgment of disposition to the Louisiana Court of Appeal for the Third Circuit, where he again raised and argued questions of federal law. On December 9, 1992, the Court of Appeal affirmed the Juvenile Court's order of homebound educational instruction as a condition of

probation. Appendix, pages A-1 - A-17. The court concluded that "the IDEA only applies to a school system's authority to expel or place handicapped students; it does not limit the authority of juvenile courts", pages A-8 - A-9, and that "the IDEA does not apply to a juvenile court judgment ordering a juvenile to be educated in a residential setting". Page A-10.

Petitioner timely sought a review of the Court of Appeal judgment by the Supreme Court of Louisiana, again raising the federal questions,Table of Contents to Application for Writ of Certiorari, Appendix, pages A-78 - A-81, but the application for certiorari was denied on February 19, 1993. Appendix, page A-22. This Petition seeks review of that final judgment.

REASONS FOR GRANTING THE WRIT

This case raises the issue of the relationship between detailed federal and state laws regarding education services to students with disabilities, and the powers of juvenile courts in proceedings involving such students. Petitioner contends that a state which accepts funds under IDEA may not implement a statutory scheme which permits its juvenile courts to ignore or override the substantive rights and procedural safeguards required by the IDEA.

I. The Louisiana court has decided an important, unsettled question of federal law which should be resolved by this Court.

The Individuals With Disabilities Education Act ("IDEA"), 20 U.S.C. §1400 *et seq.*, provides states with funds to assist in providing appropriate educational services to students with

disabilities, contingent upon State compliance with the substantive and procedural requirements of the Act. *Honig v. Doe*, 484 U.S. 305, 309-10 (1988). In participating states like Louisiana, IDEA confers upon students with disabilities an enforceable, substantive right to a free appropriate public education comprised of special education and necessary related services. *Id.* This includes the right to have decisions regarding the nature, scope and contents of educational services determined by a team of qualified professionals based upon knowledge of the child, evaluation data concerning the child, the child's disability, and available placement and service options. *See* 20 U.S.C. §1401(a)(18),(20);34 C.F.R. §§300.343, 300.344, 300.533 (1992); *c.f. Board of Education of the Hendrick Hudson*

Central School District v. Rowley, 458 U.S. 176, 208 (1982) ("[t]he primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child").

IDEA makes no exception for students whose disabilities manifest themselves through difficult behaviors, *Honig, supra*, 484 U.S. at 323, and no exception for students against whom Child In Need of Supervision or other juvenile proceedings have been brought. On the contrary, the Act demands that Louisiana provide a free appropriate public education to **all** children with disabilities within its jurisdiction, regardless of the severity

of their disabilities. 20 U.S.C. §1412(2)(C). The Louisiana Court of Appeal, however, has made just such an exception, and deemed it consistent with federal law. Its decision holds not only that Louisiana's juvenile justice statutes authorize the juvenile court to unilaterally limit Petitioner's educational program to homebound instruction for four years, but that IDEA places no limits on Louisiana's discretion to grant its courts such power.

The Louisiana Court of Appeal has thus decided that once petitioner was adjudicated to be a Child in Need of Supervision--a status offense--the State of Louisiana was free to strip him of federal rights otherwise guaranteed by IDEA. This critical, dangerous and

incorrect interpretation of federal law demands immediate correction.[5]

A. As a state accepting federal monies under IDEA, Louisiana must comply with the Act's mandates.

Part B of IDEA, 20 U.S.C. §1400 *et seq.*, as enacted in 1975, was intended to insure through grants of federal financial assistance and detailed assurances and conditions, that states provide all school-aged children with disabilities individualized education

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[5]Through this petition, Petitioner, who acceded to adjudication as a Child in Need of Supervision, contests only the manner in which the juvenile court exercised its dispositional authority. Petitioner contends that while in an appropriate case a juvenile court may make dispositional orders that affect the location of a child's educational placement, *e.g.*,by placing a child in a residential facility, in foster care, or in the custody of a State agency in turn authorized to make such a placement, the court may not dictate the nature and scope of the special education and related services the child may, or in the petitioner's case, may not, receive. Those determinations must be made by a team of qualified individuals acting in accord with IDEA's substantive and procedural requirements, convened by the public agency responsible for providing educational services in light of the particular disposition. See discussion *infra* at pp.24-32.

appropriate to their unique special needs.[6] Based on the record before it, Congress explicitly conditioned receipt of federal monies under IDEA upon the commitment of each participating state to provide each child with disabilities within its jurisdiction a free appropriate public education in accordance with the terms of the Act. 20 U.S.C. § 1412(1). The IDEA contains an unequivocal directive to states to provide a full, free and appropriate public education for all children with disabilities, regardless of the severity

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[6] While Congress' authority to enact this grant-in-aid program flows partially from its Spending Clause powers, *Board of Education v. Rowley, supra*, 458 U.S. at 190, n.11, 204,n.26, the IDEA is also an exercise of Fourteenth Amendment powers designed to effectuate the Equal Protection clause. *Smith v. Robinson*, 486 U.S. 992, 1010 (1984). Moreover, Congress expressly stated in the preamble of the IDEA: "[I]t is in the national interest that the Federal Government assist the state and local efforts to provide programs to meet the needs of [children with disabilities] in order **to assure equal protection of the law**." 20 U.S.C. §1400(b)(9) (emphasis added).

of their disability. 20 U.S.C. §1412(2)(C).[7]

A state[8] seeking to qualify for assistance must be able to demonstrate, *inter alia*, (a) that it has affirmatively established detailed policies and procedures to provide free appropriate public education for all children with disabilities, and a comprehensive plan for insuring that all handicapped children are identified, located, and evaluated, 20 U.S.C. §1412(2)(B),(C); (b) that each identified child with disabilities receives an "individualized education program" which is prepared with parental input, annually reviewed and

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[7] The term "children with disabilities" is defined under IDEA to include children whose disabilities are characterized in part by behavioral difficulties. 20 U.S.C.§ 1401(a)(1)(A)(i). See also 34 C.F.R. §300.7(b)(5), "mentally retarded"; 34 C.F.R.§300.7(b)(9) "seriously emotionally disturbed", and Louisiana Bulletin 1508, p.41 "behavior disorder."

[8] 20 U.S.C.§ 1401 (6).

revised as necessary so as to meet his/her unique needs 20 U.S.C. §§1412(4), 1414(a)(5); (c) that the state education agency, as the single agency responsible for enforcement and compliance, has detailed procedural safeguards to insure that "to the maximum extent appropriate children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled...." 20 U.S.C. §1412(5)(B); and (d) that the state has standards to "assure that children with disabilities and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education...." 20 U.S.C. §§1412(5)(A), 1415.

Under the Act, an appropriate education consists of special education

and related services meeting State educational standards, provided at public expense, under public supervision, and in conformity with an individualized education program (IEP). 20 U.S.C.§ 1401(18); 34 C.F.R. §300.8(d). Under Louisiana law, "homebound instruction" is limited to situations where a child has a serious physical or emotional illness and is undergoing a treatment regimen which does not permit education in a school setting. For emotional illnesses, the treatment must specify a specific date for return of the child to a school setting.[9] Thus, the juvenile court's disposition here where the Petitioner did not meet the criteria for consideration for "homebound instruction" -- the most restrictive setting available under

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[9] Louisiana Bulletin 1706, § 449.

Louisiana regulations[10] -- violated Louisiana's own State education agency standards. Where state education standards are higher, they must be incorporated into IDEA. *School Committee of the Town of Burlington v. Department of Education,* 736 F.2d 773, 789 (1st Cir. 1984),*aff'd on other grounds,* 471 U.S.359 (1985).

The IEP as defined by 20 U.S.C. §1401(20) is developed by a team of qualified persons[11], based on evaluation data relevant to the child's needs[12] and with significant input from the child's parents or guardian. As the written document "specially designed to meet the unique needs" of a child with a disability, the IEP is considered the "primary vehicle" for implementing the

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[10] Louisiana Bulletin 1706, § 448.
[11] 34 C.F.R. §§ 300.343 -300.344.
[12] 20 U.S.C.§1412(C); 34 C.F.R. §300.532(d),(e), (f); §300 533(a)(1)(2).

Congressional goals of IDEA, and the "centerpiece of the statute's education delivery system for disabled children." *Honig, supra*, 484 U.S. at 311. The statutory requirements governing the content of an IEP demonstrates the careful, detailed, comprehensive planning entailed in determining the nature and scope of education for children with disabilities. Such document must be reviewed annually and, if appropriate, revised to meet the child's education related needs.[13] Problems caused by disruptive or inappropriate behavior can and were intended to be addressed in the IEP process. Children with disabilities have a right to participate in the full variety of educational programs and services which are available to non-disabled students in the school system,

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[13]20 U.S.C. §1414(a)(5); 34 C.F.R. § 300.343(d).

including, *e.g.*, art, music, industrial arts, consumer homemaking and vocational education, physical education, and extracurricular activities.[14] Here, without any consideration of Petitioner's educational needs, and despite the specific recommendations of the consultative psychiatrist, the juvenile court through its limiting disposition precluded this child with a behavior disorder from participation in the full curriculum of the school program.[15]

After an instructional program has been individualized for a child, the members of the child's IEP team must, based on the IEP, select a placement capable of providing the services and meeting the goals identified in the IEP. Section 1412(5)(B) of IDEA creates a

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[14] 34 C.F.R. § 300.305.

[15] B.C. continues to be denied full educational opportunity and currently receives no related services.

legal presumption in the right of all students with disabilities to be educated to the maximum extent appropriate in the regular education classroom with their non-disabled peers. Specifically, the statutory provision requires that "to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, **or other removal of children with disabilities from the regular education environment** occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." (Emphasis added).

Each participating state and school district must have "a continuum of alternate placements available to meet the needs of" students with disabilities.[16] The continuum must include instruction in regular class as well as instruction in hospitals and institutions[17]; it must also provide for supplementary services, such as resource room, aides, or itinerant instruction to be offered in conjunction with regular class placement.[18] Furthermore, unless a child's IEP calls for an alternative placement, a school system is required "to the maximum extent appropriate" to place a student with disabilities in the regular class setting, and unless inconsistent with the student's IEP, in the same school he would attend if he

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[16] 34 C.F.R. § 300.551(a).
[17] 34 C.F.R. § 300.551(b)(1).
[18] 34 C.F.R.§ 300.551(b)(2).

were not disabled.[19] Finally, in choosing the "least restrictive environment" consistent with the requirements of IDEA, the IEP team is required to consider "any potential harmful effect on the child and the quality of services which he or she needs."[20]

In the instant case the Petitioner's IEP team, which convened prior to the disposition by the juvenile court, reviewed his evaluations and school history, and properly recognized that the in-school conduct for which he was being adjudicated was related to his behavioral-emotional disorder and that they were responsible for providing him with an appropriate program to address his individual educational and behavioral needs. Accordingly, the members of B.C.'s IEP committee developed an

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[19] 34 C.F.R. § 300.552(c)
[20] 34 C.F.R. § 300.552 (d)

individualized education program calling for his placement in the public school, under close supervision of an aide.

Moreover, school personnel testified at B.C.'s juvenile court proceeding concerning the proposed IEP and the school's ability to implement it effectively. Recognizing that homebound instruction is the most restrictive placement on the continuum of alternatives available to the district[21], and that such placement was not only inappropriate for meeting the needs of a thirteen year old child with emotional-behavioral disorders but, unlawful[22] as well, the IEP committee recommended that Petitioner continue to be educated in the local school.

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[21] Louisiana Bulletin 1706, § 448.

[22] Petitioner did not qualify for "homebound instruction" based on the criteria established by the State in §449 of Bulletin 1706.

This Court recognized in *Board of Education v. Rowley, supra*, that strict adherence to the Act's procedural requirements set forth in 20 U.S.C. §1415 plus parental participation in the development of state plans, policies, and, particularly in the development and subsequent review of the child's IEP as well as any assessment of its effectiveness,[23] is critical to insure that children with disabilities receive all of the benefits to which they are entitled by the Act. 458 U.S. at 205-206, 208-209. The Act contains various procedural safeguards that guarantee parents an opportunity for meaningful input into all decisions affecting their child's education as well the right to seek review of any decisions with which they disagree via an impartial

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[23] 20 U.S.C. §§ 1400 (c), 1401(20), 1412(7), 1415(b)(1)(A),(C),(D),(E), and 1415(b)(2).

administrative hearing, and, if aggrieved by the hearing decision, a right to judicial review in any federal or state court of competent jurisdiction. 20 U.S.C.§1415 (b)(1).,(2),(c); 20 U.S.C. §1415(e)(2).

Responsibility for changing a disabled child's education placement rests with the members of the child's IEP team, which includes the child's parent(s), after consideration of the child's needs, evaluation data[24], current program and placement, and placement options. *S-1 v. Turlington*, 635 F.2d 342,347 (5th Cir. 1981), *cert denied* 454 U.S. 1030 (1981), *citing* 34 C.F.R. § 300.533(a)(3), § 300.345.

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[24] Under Louisiana regulations, a child may not be placed in a more restrictive environment unless a re-evaluation, supporting such a placement, has been completed.Louisiana Bulletin 1706 § 458B.

In short, as a child with disabilities, Petitioner is entitled under IDEA to receive a full and appropriate public education in a setting in which he is integrated to the maximum extent appropriate with non-disabled students. All education related decisions must made by a properly convened team knowledgeable about evaluation data relevant to his disabilities, his educational needs, and effective strategies and methodologies for addressing his behavioral management needs through his IEP. The juvenile court's order has deprived Petitioner of these protections for four years.

As discussed below, the legislative history of IDEA demonstrates that children such as B.C. are in fact the very children intended to be protected by Congress, if not from the wanton neglect

of society, from the unlawful exclusions by public schools, and increasingly, from the nefarious abuse of the judicial process. For a juvenile court to be permitted to sidestep the due process requirements of IDEA and violate the rights guaranteed by it would nullify the clear intent of Congress.

B.Protection of emotionally disturbed students like Petitioner from exclusion from school and educational neglect was a key impetus for passage of IDEA

Congress enacted the Individuals with Disabilities Education Act (formerly, the Education of All Handicapped Children Act), 20 U.S.C. §1400 *et seq.*, in 1975, in response to evidence of mistreatment and abuse, including that "for years [disabled] children of this country have been kept in the dark, deprived of a full, free public education." 121 Cong. Rec. H

37027 (daily ed., Nov. 18, 1975) (remarks of Rep. Gude). Passage of the Act was the culmination of legislative attempts by Congress begun in 1966, to address the national failure to provide children with disabilities "educational opportunity that has been long considered the right of every other American child" 121 Cong. Rec. S 20427 (daily ed., Nov. 19, 1975) (remarks by Sen. Randolph), by progressively increasing federal responsibility for such education.[25]

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[25] Pub. L. No. 89-10, 79 Stat. 27 [codified at 20 U.S.C. §§ 236-244 (1965)]; amended by Pub. L. No. 89-750, §161, 80 Stat. 1204[codified at 20 U.S.C. §§ 1201-1213 (1966)]; amended by Pub. L. No. 91-230, §§601-621, 84 Stat. 175-88 [codified at 20 U.S. C. §§ 1401-1461 (1970); amended by Pub. L. No. 93-380, §611-621, 88 Stat. 579-585[codified at 20 U.S.C. §§ 1401-1461 (Supp. 1975)]; amended by Publ. L. 94-142, 89 Stat. 773 [codified at 20 U.S.C. §§1401-1461 (1976)](Education for all Handicapped Children Act of 1975); amended by Pub. L. 101-476, 104 Stat. 1103 (1990)[codified at 20 U.S.C. §§ 1401 -1461].

H.R. Rep. No. 332, 94th Cong., 1st Sess. 2-7 (1975) (hereinafter "House Report"); S. Rep. No. 168, 94th Cong., 1st Sess. 5-8 (1975), reprinted

At regional hearings held in 1973 and 1974, the Subcommittee on the Handicapped of the Committee on Labor and Public Welfare heard numerous witnesses, including parents, teachers, special education professionals, and other professionals experienced in the education and care of handicapped children, testify that substantial numbers of children with disabilities were excluded from school, denied necessary services, and subjected to educational neglect.[26] Parents and educators discussed the widespread failure of states to provide the breadth of supportive services necessary to meet the varied needs of children with

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in 1976 U.S.Code Cong, & Ad. News, 1425, 1429-32 (hereinafter "Senate Report")

[26] Education for All Handicapped Children, 1973-74: Hearings on S.6 Before the Subcommittee on The Handicapped for the Senate Committee on Labor and Public Welfare, 93rd Cong., 1st Sess. (1973-74) [hereinafter "Senate Hearings"]; House Report, *supra*, n. 25 at 5-6.

disabilities. Prominent among the services discussed were many that would assist emotionally disturbed students and others whose disabilities included behavioral manifestations to benefit from and participate in special education programs, such as specialized diagnostic evaluations, individualized tutoring, behavior-modification programs, self-help and self-care skills training programs, and psychological counseling.[27]

Statistics compiled for Congress by the Office of Education estimated that of eight million children with disabilities in the United States, nearly two million were excluded from public schools, and more than four million of these children were receiving an inappropriate education.[28] Eighty-two percent of

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[27] Senate Hearings, *supra*, n.26 at 45, 87, 797, 809, 813, 790, 833.

[28] Senate Report, *supra*, n. 25, at 8; House Report, *supra*, n. 25, at. n. 12. Pub. L. No. 94-

those children classified as emotionally disturbed were unserved.[29]

Throughout the hearings, legislators specifically referred to the problem of exclusion.[30] Another widespread problem was flagged by Senator Brooke, who noted

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142,§3(a), 89 Stat 774 (1975)(reprinted in notes to 20 U.S.C. §1401), codified at 20 U.S.C. §1400(b)(1)-(4).

[29] *Id.*

[30] Senator Williams, chair of the subcommittee, summarized his observations as follows: "**Exclusion from school**, institutionalization, the **lack of appropriate services to provide attention to the individual child's need** -- indeed the **denial of equal rights** by a society which proclaims liberty and justice for all of its people -- are echoes which the subcommittee has found throughout all of its hearings ..." Senate Hearings, supra, n. 26 at 1155-56 (emphasis added).

Senator Mondale made similar observations:"For many years handicapped children have been placed in institutions, or segregated in schools and classes, or **left to sit at home**, where they have not received the educational opportunity which is their right under the law." Senate Hearings, supra, n. 26, at 1153 (emphasis added).

In an observation particularly pertinent to the issues of this case, David Bartley, Speaker of the Massachusetts House of Representatives, testified that "[c]hildren have been denied an education because of their adjudged incorrigibility or maladaptive behavior..." Senate Hearings, supra, n. 26 at 346

that although most state constitutions guarantee a right to education, "[m]ost states have legal provisions which authorize school authorities to exclude certain students from public schools." Hence, the Senator observed, states "deny those very children who most need help in being taught." Senate Hearings, *supra*, n.26 at 342.

Congress was aware that the kind of provisions expressly noted by Senator Brooke had in fact been successfully challenged in two prominent federal actions. See *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, 343 F.Supp. 279 (E.D. Pa. 1972)(herinafter *PARC v. Pennsylvania*); *Mills v. District of Columbia Board of Education*, 348 F.Supp. 866 (D.D.C. 1972). These cases established the principle that exclusion is unconstitutional.

Mills, for example, held the exclusion of all handicapped children, whether they were labeled retarded, hyperactive, or "behavior problems" to be violative of the equal protection principles embodied in the Fifth Amendment; and that due process requires that a full and fair hearing precede exclusion from or placement in a special education program. *Id.* at 875.[31] As this Court has repeatedly recognized, Congress enacted IDEA in order to make real the rights recognized in *Mills* and *PARC*. *See Rowley, supra*, 458 U.S. at 192; *Honig, supra*, 484 U.S. at 324-325.

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[31] See House Report, *supra*, note 25 at 3-4. In the consent agreement in *PARC v. Pennsylvania, supra*, the court acepted plaintiffs' position based on expert testimony that all retarded children are capable of benefitting from education and training, and therefore, could not be excluded on the basis of handicap.

C. The issues raised herein require resolution by this Court before the harms of inappropriate juvenile court actions are further multiplied.

Petitioner's experience is not an anomaly. In the five years since this Court's decision in *Honig v. Doe, supra,* (discussed further in Section II. *infra*) children with behavioral or emotional disorders have increasingly been targets of alternative schemes for removing them from public education programs. Chief among them is the practice of which the Petitioner here was a victim: the filing and prosecution of Child In Need of Services, delinquency and similar juvenile petitions against emotionally disturbed children for in-school, disability-related behavior, followed by dispositions that ignore IDEA rights. (See Section III, *infra*, for examples of specific state proceedings.)

The practice of consigning students with disabilities to the juvenile justice system, if unchecked, poses a risk to the 392,161 children nationwide (4,268 in Louisiana) who have been identified as emotionally disturbed[32], whose IDEA rights are at stake.

Absent a ruling by this Court making it clear that IDEA does circumscribe the dispositional authority a State may grant

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[32] Office of Special Education Programs, U.S.Office of Special Education and Rehabilitative Services, U.S. Department of Education, *To Assure the Free Appropriate Public Education of All Children With Disabilities: Fourteenth Annual Report to Congress on the Implementation of The Individuals with Disabilities Education Act* (1992) at A-6.

This number is underinclusive, because children labelled as behavior disordered or emotionally disturbed are not the only children with disabilities who exhibit behaviors, related to those disabilities which may result in their being referred to the juvenile justice system. For example, children with mental handicaps or severe learning disabilities also frequently exhibit challenging behaviors. Such children are significantly overrepresented in juvenile detention facilities. C. Nelson, "Handicapped Offenders in the Criminal Justice System", *Special Education in the Criminal Justice System*, C.M. Nelson, R.B. Rutherford, and B.I. Wolford, editors, Merrill,1987, pages 2-17.

its juvenile courts in such proceedings, both inappropriate resort to those courts and abrogation of IDEA rights through improper educational decision-making by juvenile courts will continue unabated, encouraged by the decision of the Louisiana Court of Appeal. In Louisiana, such abuses will likely increase, placing the state's children with disabilities at even greater risk. Only prompt intervention by this Court will protect Louisiana children and youth whose disabilities manifest themselves through difficult behaviors, and ensure that other state courts do not follow Louisiana's lead.

II. The Louisiana court has decided a federal question in a way that conflicts with this Court's decision in *Honig v. Doe*

The Louisiana Court of Appeal relied exclusively upon this Court's

decision in *Honig v. Doe, supra,* to conclude that IDEA placed no limits on the authority of the juvenile court to limit the availability of appropriate special education and related services to Petitioner, dictate the details of his education, and otherwise abrogate his federal rights. The Louisiana court not only construed *Honig* far too broadly, but rendered a decision completely at odds with it.

In *Honig*, this Court addressed for the first time rights of disabled students alleged to be disruptive or dangerous in school. The case stemmed from an action challenging the indefinite suspensions of two emotionally disturbed students who were excluded from school because they were considered dangerous and disruptive. The Court of Appeals had affirmed the trial court's determination

that 20 U.S.C. §1415(e)(3) applied to the attempts to expel the students. The State of California argued that there must be an exception to §1415(e)(3) for dangerous students. This Court rejected California's argument, stating that the express language of IDEA was "unequivocal," and refusing "to read a 'dangerousness' exception into" the statute. *Honig*, 484 U.S. at 323. The Court also noted Congress' intent, apparent from the legislative history of the Act, to safeguard the education rights of all disabled students, particularly those with serious emotional disturbance. *Id.* at 309.

Honig thus stands for the proposition that students with disabilities may not be stripped of their rights under IDEA simply because they are disruptive or dangerous. In order to

safeguard those rights and to strike a balance between emotionally disturbed students' "interest in receiving a free appropriate public education in accordance with the procedures and requirements of the EHA [IDEA]...[and] the interests of state and local school officials in maintaining a safe learning environment for all their students," *Honig*, 484 U.S. at 328, the Court allowed that in exigent circumstances involving truly dangerous students, school officials may request competent courts to order that a student be temporarily excluded from school. *Id.*

Contrary to the conclusion of the Louisiana Court of Appeal, *Honig* did not raise, and this Court did not address, the extent to which state courts in various kinds of state law proceedings may with impunity issue orders that

contravene IDEA rights. *Honig* addressed judicial authority in one very specific context, holding only that §1415(e)(3) does not "limit the equitable powers of district courts such that they cannot, in appropriate cases **temporarily** enjoin a **dangerous** disabled child from attending school," *Honig*, 484 U.S. at 327 (emphasis added), because "the stay-put provision in no way purports to limit or pre-empt the authority conferred on courts **by §1415 (e) (2).**" *Id.* (citation omitted) (emphasis added). That §1415(e)(3), when applicable, does not preclude such equitable relief does not mean that States may accept IDEA monies and then endow their juvenile courts with unlimited statutory authority to strip children of their IDEA rights.

Honig assumes four conditions as prerequisites to a valid court order

excluding a disabled child from school: that §1415(e)(3) is applicable, meaning that a due process hearing or review, pursuant to §1415(b),(c), or a civil action pursuant to §1415(e)(2) is pending in which a final determination will be made regarding appropriate educational services for the child consistent with IDEA requirements; that the order excluding the child is a temporary one, pending completion of those proceedings; that the court issuing the order is a federal district court or a state court of competent jurisdiction hearing a civil action brought pursuant to §1415(e)(2); and that the child has been proven in court to be dangerous. *Honig*, 484 U.S. at 327. The latter requires a showing that "maintaining the child in his or her current placement is substantially likely to result in injury either to himself or

herself, or to others." *Honig*, 484 U.S. at 328.

None of these conditions are present in the instant case. The juvenile court that ordered Petitioner excluded from school is not competent under Louisiana law to hear civil actions pursuant to §1415(e)(2)[33], and there were no proceedings pending under §1415(b)(c) or (e)(2) in which ultimate educational determinations would be made consistent with IDEA requirements.[34] The juvenile court thus was not competent to, and in fact did not, "temporarily enjoin

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[33] The Louisiana Constitution, Article V.§ 18, provides that juvenile courts have jurisdiction as provided by law. The Children's Code does not confer any jurisdiction on such courts to provided judicial review special education administrative proceedings. Indeed, La. R.S.49:464 clearly vests civil district courts, rather than juvenile courts, with jurisdiction over judicial review of adjudication proceedings.

[34] Such proceedings have not been invoked because the school system's failure to implement Petitioner's IEP is solely due to the juvenile court judgment at issue herein.

a...disabled child from attending school," *Honig*, 484 U.S. at 327, pending such determinations. Rather, through its disposition it prohibited him from receiving anything except homebound instruction for the next four years, an action which even a court of competent jurisdiction would not be permitted to take. Moreover, the behavior for which the juvenile court barred Petitioner from school did not approach the standard for dangerousness that *Honig* sets.

Furthermore, *Honig* does not contemplate a court acting *sua sponte* as an educational decision-maker, as was the case here, but rather a court granting equitable relief at the request of professional educators, see 484 U.S. at 328, who in order to prevail must not only overcome "a presumption in favor of the child's current educational

placement...by showing that maintaining the child in his or her current placement is substantially likely to result in injury either to himself or herself, or to others," *Id..*, but must also satisfy the traditional, rigorous criteria for injunctive relief.[35] Presumably, this requires presentation of competent, credible evidence and testimony informed by the professional judgment of competent educators familiar with the child, his or her history and evaluation data, and various placement options. *Honig* thus assumes parties, evidence and the fulfillment of remedial standards not part of the Louisiana proceeding to which Petitioner was subjected.

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[35] See, *e.g. Texas City Independent School District v. Jostad,* 752 F.Supp 231,233,238 (S.D. Tex.1990), noting that injunctive relief is an "extraordinary remedy," and applying the criteria of *Treasure Salvors v. Unidentified Wrecked and Abandoned Sailing Vessel,* 640 F.2d 560, 568 (5th Cir. 1981) to school district request for *Honig* injunction.

III. The Louisiana court has decided a federal question in a way that conflicts with the decisions of other state courts which have considered the question.

By refusing to harmonize Louisiana's juvenile jurisdiction statutes with the requirements of federal law, the Louisiana appellate court has so deviated from judgments on similar issues in other states as to warrant review by this Court.

Appellate courts in other states which have faced the issue of the jurisdiction of juvenile courts to rule on special education issues have uniformly ruled that such courts do not have the power to issue orders inconsistent with the substantive or procedural precepts of the IDEA. *In re Tony McCann*, C.A. No. 158 (Ct. App. Tenn. 1990), 17 EHLR 551 (juvenile court may not order the cessation of all educational services to

a special education student); *Oscar F. v. County of Worcester*, 587 N.E. 2d 208 (Mass. 1992),(juvenile judge lacks authority to order a specific educational placement); *In the Matter of Shelly Maynard*, Fam.Ct., 453 N.Y.S. 2d 352 (1982) (school system must fulfill its responsibilites to provide an appropriate special education placement for a disabled child before the court would become involved in truancy issues); *In the Interest of J.D*, 510 So. 2d 623 (Fla. App. 1 Dist. 1987)(juvenile court's dependency jurisdiction does not extend to educational issues for which remedies and procedures are set forth in the IDEA); *Flint Board of Education v. Williams*, 276 N.W. 2d 499 (Mich. App.,1979) (school system may not ask probate court to take jurisdiction over a special education student until

administrative proceedings under the school code's special education provisions have terminated and a final decision has been made that no program within the school system can serve the child's needs).

This unanimity of results in other states does not, however, render the Louisiana decision a mere aberration unworthy of attention by this court. Most state courts have not addressed these issues at all. Those which have employ different legal analyses, and the scope of their decisions vary widely. Moreover, in each of the above-cited cases, the juvenile courts had assumed jurisdiction over disabled students and issued orders related to their educational programming. Although this interference was eventually declared inappropriate by appellate courts, the harms of inconsistent

treatment under juvenile and education codes had already occurred.

As discussed above, special education students frequently come in contact with the juvenile justice system. It is highly likely that these harms are being multiplied in juvenile courts nationwide, often in cases which are never appealed. Due to this patchwork of varying state laws, state decisions based on differing facts and analyses, and absence of any guidance in most states, guidance from this Court is needed.

CONCLUSION

The draconian consequences faced by plaintiff underscore the urgency of review and reversal by this court. Petitioner, who has substantial need for special education and related services, and whom school officials wish to

continue educating in the public schools, has been ordered to spend his adolescence at home, isolated from his peers, with only the minimal educational services and interventions possible in that setting. This abrogation of his IDEA rights occurred as a consequence of in-school behavior related to the student's disability: a manifestation of the very disability that triggered his need for and entitlement to protection and services under IDEA, and the very behavior that IDEA requires States to attempt to ameliorate through the provision of a free appropriate public education. Intervention by this Court will vindicate Petitioner's rights and salvage his future.

This substantial and significant issues posed by this case warrant review by this Court because of the frequent and

growing involvement of children with disabilities, particularly behavioral disabilities, with the juvenile justice system. The lack of specific guidelines regarding the effect of special education laws on such systems have resulted in many of the harms which IDEA was designed to eliminate. A clarification and thoughtful anaysis of this complex issue is needed. This honorable Court should therefore grant a writ of certiorari to the Louisiana Court of Appeal in order to reverse this specific violation of federal special education law and to resolve the issue of the authority of state courts of juvenile jurisdiction to limit the rights of students with disabilities under IDEA.

Respectfully submitted,

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